IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1246 OF 2006

Vidya Ganapati Shanbhag,
an Indian Inhabitant, residing at
Shanti Complex, "E" Wing,
Flat No.302, 3rd Floor, Tungagram,
Opp. L & T Gate No.7, Pawai,
Mumbai-400 072. .. Petitioner.
(Next friend of detenu)

Vs

1. The State of Maharashtra,
through the Secretary,
to the Government of Maharashtra
Home Department, Mantralaya,
Mumbai -400 032.

2. Neela Satyanarayan,
The Principal Secretary to
the Government of Maharashtra,
Home Department (Appeals
and Security),
and Detaining Authority,
Mantralaya, Mumbai-400 032.

3. The Superintendent of Prison,
The Mumbai Central Prison,
Arthur Road, Mumbai.

4. The Superintendent of Prison,
Nasik Road Central Prison,
Nasik. .. Respondents.

Mr.Maqsood Khan, for the petitioner.
Mr.D.S.Mhaispurkar, APP for the respondents.

CORAM : SMT.RANJANA DESAI & D.B.BHOSALE,JJ.
DATED : 17th APRIL, 2007

ORAL JUDGMENT : (PER D.B.BHOSALE, J.)

1. This writ petition under Article 226 of the Constitution of India filed by the next friend of

detenu-Shantaram Raghunath Sawant, seeks to quash and set aside an order of detention dated 18.6.2005 issued by the Principal Secretary to the Government of Maharashtra, (Appeals and Security) Home Department, Mantralaya, Mumbai, against the detenu under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "the COFEPOSA Act"). The order of detention dated 18.6.2005 is based on the grounds of detention dated 18.6.2005, recording that it is necessary to detain the detenu with a view to preventing him in future from smuggling goods.

2. The order of detention and the grounds of detention, both dated 18.6.2005, were served on the detenu on 6.5.2006. The smuggling activities of the detenu were found to be falling under section 113 read with section 50(2) of the Customs Act and Rules 11 and 14 of the Foreign Trade (Regulation) Rules, 1993. Considering the nature and gravity of the offence and the well organised manner in which the detenu is engaged in the prejudicial activities, the detaining authority has recorded its satisfaction that unless detained, the detenu is likely to continue to engage in prejudicial activities in future also and hence passed the impugned order of detention. The detenu was also informed that he has a right to make

representation/s to the detaining authority, State Government, Central Government and the Advisory Board against the detention order. We have not made reference to the grounds of detention in detail since the learned counsel for the petitioner argued only one ground, that is, ground no.4(xiv).

3. We heard Mr Khan, learned counsel for the petitioner and Mr Mhaispurkar,learned APP for the State for quite some time and with their assistance went through the impugned order, grounds of detention as well as other material to which our attention was specifically drawn by them. Mr Khan invited our attention to the ground no.4(xiv) in the Memo of Appeal and made two-fold submissions. Firstly, the order of detention deserves to be quashed and set aside on the ground of delay in consideration of the representation and, secondly, the explanation offered in the reply affidavit by the detaining authority for the delay that the Deputy Secretary was awaiting the opinion of the Advisory Board, is unsustainable in law. He submitted that it was not necessary for the Deputy Secretary to await the opinion of the Advisory Board as the same is not a condition precedent in law before considering the representation of the detenu. Mr Khan thereafter invited our attention to the dates to show as to how the representation of the detenu

travelled and how the delay was caused at every stage.

4. It appears that the detaining authority received representation dated 15.6.2006 on 20.6.2006 through the Superintendent of Nasik Road Central Prison, Nasik. For considering the representation as per the procedure adopted, parawise comments on the representation were called for from the sponsoring authority and the comments of the said authority were received on 26.6.2006. Thereafter the concerned assistant prepared a detailed note on 1.7.2006 and forwarded it to the Under Secretary who, in turn, forwarded it to the Deputy Secretary. He received it on 3.7.2006. From 3.7.2006 till 18.7.2006 the Deputy Secretary was awaiting a report/opinion of the Advisory Board which, in fact, was received on 18.7.2006. The concerned file was thereafter processed and the confirmation order was issued on 26.7.2006. Then, the file was submitted by the Under Secretary to the Deputy Secretary, who made his endorsement on 28.7.2006 and forwarded the papers to the detaining authority. The representation was rejected on 29.7.2006. The objection for the delay was for the period between 18.7.2006 and 26.7.2006. Mr Khan submitted that this delay of about eight days has not been explained either by the detaining

authority or by the sponsoring authority in their affidavits.

5. Mr Mhaispurkar, learned APP, on the other hand, invited our attention to the reply affidavit dated 30.8.2006 and another affidavit filed by the detaining authority on 20.3.2007 wherein, according to Mr Mhaispurkar, the delay between 1.7.2006 and 29.7.2006 has been explained by showing sufficient cause. Mr Mhaispurkar submitted that in view of the explanation offered by the detaining authority and the sponsoring authority in their reply affidavits for the delay between 1.7.2006 and 29.7.2006 the order of detention or the continued detention cannot be held to be illegal and on that ground the order would not vitiate. Mr Khan did not argue any other grounds, though some other grounds are also raised in the Memo of writ petition.

6. We perused the reply affidavits filed by the detaining authority and more particularly the affidavit dated 20.3.2007. In paragraph 2 thereof the detaining authority has explained the delay in the following manner:-

> " ... ...It is denied that while considering the said representation there was a delay from 1.7.2006 till 29.7.2006, i.e. about 28 days on my part as a Detaining Authority. It is

denied that the said delay was not properly explained. It is denied that there was unauthorised delay on the part of the Deputy Secretary and that I have rendered the continued detention of the detenu illegal, null and void. It is denied that there was no need on my part to wait for the report of the Advisory Board. It is denied that I have not considered the said representation independently and uninfluenced by the opinion of the Advisory Board. It is denied that in view of the provisions of the COFEPOSA Act about the reference being made to the Advisory Board and further issued the order by confirming or revoking the order of detention after receipt of the opinion of the Advisory Board and therefore there was no reason for the detaining authority to wait till the decision of the Advisory Board. It is denied that the representation was placed before me only after the decision of the Advisory Board therefore, I could not have considered the representation between 18.7.2006 to 26.7.2006. It is denied that the procedure adopted by the Deputy Secretary and me has rendered the detention of the detenu illegal, null and void because of loss of 28 days in considering the representation.

I state that in the present case, the order of detention was issued by the then Detaining Authority on 18.6.2005. I state that the said order of detention was served upon the detenu on 6.5.2006. I state that the case of the detenu was referred to the Advisory Board on 31.5.2006. The Hon'ble Advisory Board heard the detenu personally on 23.6.2006. I state that during the pendency of the reference of the detenu, I had received the representation dated 15.6.2006 on 20.6.2006 through the Superintendent of Nasik Road Central Prison, Nasik. I state that for considering the representation as per the procedure adopted, the parawise comments on the representation were called for from the Sponsoring Authority. Thereafter the Deputy Secretary called for the report of the Advisory Board as the case of the detenu was already referred to the Advisory Board. After the report of the Advisory Board was received in the department on 18.7.2006 the confirmation order was issued on 26.7.2006. On 27.7.2006 the file was again submitted by the Under Secretary to the Deputy

> Secretary. The Deputy Secretary gave his endorsement on 28.7.2006 and forwarded the papers to me. I state that as far as the decision of the confirmation is concerned, the same is taken by the Additional Chief Secretary (Home), who is empowered to exercise the powers of the State Government in confirming the order of detention pursuant to the opinion of the Advisory Board."

7. From perusal of the relevant documents as also the explanation offered by the detaining authority explaining the delay it is clear that the delay between 18.7.2006, on which the report of the Advisory Board was received and 26.7.2006, on which the confirmation order was issued, has not been explained at all. The Deputy Secretary, Home Department, (Spl), Government of Maharashtra in his affidavit dated 5.9.2006 in paragraph 4 thereof has simply stated that after receipt of the report of the Advisory Board on 18.7.2006, the concerned file was processed and thereafter the confirmation order was issued on 26.7.2006. There is absolutely no explanation offered by the detaining authority or the sponsoring authority explaining the delay between 18.7.2006 and 27.7.2006. Even if it is assumed that the Deputy Secretary was justified in awaiting the opinion of the Advisory Board and, therefore, the delay between 1.7.2006 and 18.7.2006 occurred, still, further delay between 18.7.2006 and 26.7.2006 has not been explained at all and we do not find any justification for this delay on

record.

8. The Supreme Court in **Rajammal's** case was considering the similar ground of challenge wherein there was delay of only 5 days. This delay was explained by merely stating that the Minister was on tour and hence he could pass the order only on 14.2.1998. The explanation for the delay from 9.2.1998 to 14.2.1998 was held to be unjustifiable and on this ground the Supreme Court allowed the appeal and set aside the order of detention. The relevant paragraph 9 in the judgment of the Supreme Court reads thus:

> "9. What happened in this case was that the Government which received remarks from different authorities submitted the relevant files before the Under-Secretary for processing it on the next day. The Under-Secretary forwarded it to the Deputy Secretary on the next working day. Thus there is some explanation for the delay till 9.2.1998. Thereafter the file was submitted before the Minister who received it while he was on tour. The Minister passed the order only on 14.2.1998. Though there is explanation for the delay till 9.2.1998, we are unable to find out any explanation whatsoever as for the delay which occurred thereafter. Merely stating that the Minister was on tour and hence he could pass orders only on 14.2.1998 is not a justifiable explanation when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. Absence of the Minister at the Headquarters is not sufficient to justify the delay; since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen."

9. This court recently had an occasion to consider the similar ground raised in Atul Sunderji Dadhia Vs. State of Maharashtra and ors in Criminal Writ Petition No.1667 of 2006, decided on 11.4.2007 wherein after considering the aforesaid judgment of the Supreme Court as also the judgments of the Supreme Court in **(i) Mohinuddin Alias Moin Master Vs. District Magistrate, Beed and Others 1987 Supreme Court Cases (Cri) 674;** and **(ii) Rama Dhondu Borade Vs. V.K.Saraf AIR 1989 Supreme Court 1861**, this Court in paragraph 13 of the judgment observed thus :

> "It is true, there is no prescribed period either under the provisions of the Constitution of India or under the COFEPOSA Act within which the representation should be dealt with. However, the language employed in Article 22(5) of the Constitution of India, as held by the Supreme Court in **Rama Dhondu Borade's** case (supra), manifestly and very clearly demonstrates that the representation should be expeditiously considered and disposed of with due promptitude and diligence and with a sense of urgency and without avoidable delay. However, if the order of detention cannot be held to be void, a subsequent infraction, namely, wholly unexplained and unduly long delay in disposal of the representation or noncompliance with the procedure prescribed under law within the shortest possible time, the continued detention would vitiate and should be quashed and set aside."

10. In the present case, as observed earlier, the delay between 18.7.2006 and 26.7.2006 is so unreasonably long and the explanation offered by the authorities is so unsatisfactory, it has, in our opinion, vitiated the continued detention of the detenu. It is strange that the concerned authorities should have acted in such a cavalier fashion while dealing with the detenu's representation. We are satisfied that there was a failure on the part of the detaining authority to discharge its obligation under Article 22(5) of the Constitution of India. It is very unfortunate that though initial order of detention issued under section 3(1) of the COFEPOSA Act is found to be legal and based on subjective satisfaction, we are constrained to set aside further detention of the detenu on the ground of noncompliance of the procedure prescribed under the law within the shortest possible time and for want of justified explanation for delay. The detaining authority, in absolutely casual manner, completely ignored the constitutional safeguards embodied in Article 22(5) and has failed to offer any explanation as to why it could not avoid the delay between 18.7.2006 and 26.7.2006. In the circumstances, We do not deem it necessary to examine the other contentions of Mr Khan that the Deputy Secretary or the Detaining Authority for that matter was not justified in awaiting the

opinion of the Advisory Board. In the circumstances, we set aside the continued detention of the detenu holding that only the initial order of detention issued under section 3(1) of the COFEPOSA Act is legal.

11. In the result, the writ petition is partly allowed. The continued detention of the detenu - Shantaram Raghunath Sawant under the order of detention dated 18.6.2005 passed by the Principal Secretary (Appeals and Security) Government of Maharashtra, Home Department and detaining Authority, is quashed and set aside. However, the order of detention stands confirmed. The detenu - Shantaram Raghunath Sawant is ordered to be released forthwith, if not wanted in any other case.

(Smt.Ranjana Desai, J.)

(D.B.Bhosale, J.)

HIGH COURT
CRIMINAL APPELLATE SIDE

CRI.WRIT PETITION NO.1246 OF 2006

Date of Judgment:

17th April, 2007.

For approval and signature

THE HON'BLE SMT JUSTICE RANJANA DESAI.

THE HON'BLE MR.JUSTICE D.B.BHOSALE.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad or Goa offices?